BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
BENEFIT DECISION

In the Matter of:

SHEILA C WATSON
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-481

Case No. 94-18800
Case No. 94-18801

SSA NO.

DAVID F FONG DDS
(Employer)

EMPLOYER ACCOUNT NO. ___ ____

OFFICE OF APPEALS NO. ING-46538-A

REM

In Case No. 94-18800, the employer appealed from the order of the administrative law judge which denied an application to vacate a decision on the merits in Case No. 94-18801 and reopen the matter for an additional hearing and decision under section 5045(e), Title 22, California Code of Regulations. In Case No. 94-18801, the employer appealed from that portion of the decision of the administrative law judge which held that the claimant was not disqualified from receiving benefits under section 1256 of the Unemployment Insurance Code.

These cases have been consolidated for decision pursuant to section 5107, Title 22, California Code of Regulations.

STATEMENT OF FACTS

The claimant worked for the above-named employer as a dental assistant for about four years until she quit her job on May 27, 1994. On June 2, 1994, the claimant filed a new claim for unemployment insurance benefits with an effective date of May 29, 1994. Although the claimant told the Employment Development Department (EDD) that the employer herein was her last employer, EDD erroneously failed to give the employer notice of the filing of the claim.

On June 17, 1994, EDD issued a notice of determination holding the claimant disqualified for benefits under section 1256 of the Unemployment Insurance Code and ineligible for benefits under code section 1253(c). The employer was not issued a ruling, nor furnished a copy of the determination. The claimant appealed the adverse determination to an administrative law judge and a hearing was held on August 4, 1994. The employer was not made a party to the appeal and was not sent notice of the hearing. On August 5, 1994, an administrative law judge issued a decision reversing EDD's determination and holding the claimant was not disqualified for benefits under code section 1256, nor ineligible for benefits under code section 1253(c). The employer was not sent a copy of the decision.

The claimant began to receive benefits as a result of the administrative law judge's decision. On September 6, 1994, EDD sent to the employer as a base period employer a notice of claim filed and computation of benefit amounts. This notice advised the employer that it was the only base period employer and that 100 percent of the claimant's benefits would be charged to its reserve account. The employer timely responded to this notice on September 8, 1994 and contended that the claimant had quit her job without notice and without good cause. Upon receipt of the employer's response, EDD requested the Inglewood Office of Appeals to vacate the decision of the administrative law judge issued on August 5, 1994 and include the employer as an interested party. On September 15, 1994, EDD sent to the employer a notice of determination and ruling based on its original determination, stating EDD had informed the claimant she was not eligible to receive benefits under California Unemployment Insurance code section 1256 and the employer's reserve account would not be subject to charges. The employer was not advised that EDD's original determination had been reversed by an administrative law judge and that the claimant had been held not disqualified from receiving benefits.

On September 20, 1994, the presiding administrative law judge of the Inglewood Office of Appeals issued an order denying the application for reopening, noting that, "The situation in this case is almost identical to that presented in P-B-421. The Department's request for reopening has been made after the decision granting benefits has become final." The employer was furnished a copy of this order and responded to the Inglewood Office of Appeals by letter dated and postmarked September 29, 1994. The employer stated the notice of claim filed and computation of benefit amounts sent on September 6, 1994 was the first notice that the employer had received about proceedings

involving the claimant. The employer further stated that "I would like to appeal the judge's decision if the employer (me) had an adverse judgement, and would like the opportunity to discuss this matter in a hearing and/or to present my case before the judge."

The presiding administrative law judge wrote to the employer on September 30, 1994 to explain what had occurred to that point. The employer was further advised that the effect the proceedings had on the employer's reserve account was up to the EDD and, if he had any questions, he should contact the EDD directly. On October 7, 1995 the employer wrote to the Appeals Board stating he had spoken with an EDD representative who told him that whether his reserve account would be charged or not depended on the Appeals Board. The employer stated, "I request that this case be reopened so that I may be offered a hearing to present my case and appeal the decision of the judge, from a letter sent to me dated September 20, 1994."

REASONS FOR DECISION

In the cases before us, the presiding administrative law judge denied EDD's application to vacate the previously issued decision on the merits and reopen the matter for an additional hearing and decision, based on the reasoning that the situation here was almost identical to that in Appeals Board Precedent Decision P-B-421, and that the previously issued decision had become final. We believe there is a difference in the two situations. Namely, because of the unique procedural aspects of P-B-421, it appears the employer in that case never submitted a written communication that could be considered an appeal or application to vacate the decision of the administrative law judge and reopen the matter. In the cases before us the employer has made a written appeal and request to reopen. Nevertheless, given the discussion on finality in P-B-421, it is very understandable that the presiding administrative law judge found that precedent controlling in the present situation.

The cases before us reflect the difficulty we have noticed that the EDD and our offices of appeals have had in applying P-B-421 to different situations. In our consideration of these cases we have concluded certain errors were made in P-B-421, especially with regard to the finality of the decision of an administrative law judge. We take this opportunity to correct those errors.

Section 1256 of the Unemployment Insurance Code states:

> "An individual is disqualified for unemployment compensation benefits if the director [of the EDD] finds that he or she left his or her most recent work voluntarily without good cause or that he or she has been discharged for misconduct connected with his or her most recent work."

Section 1327 of the Unemployment Insurance Code states:

> "The department [EDD] shall give a notice of the filing of a new or additional claim to the employing unit by which the claimant was last employed immediately preceding the filing of the claim . . . . The employing unit so notified shall submit within 10 days after the mailing of the notice any facts then known which may affect the claimant's eligibility for benefits . . . . The 10-day period may be extended for good cause."

Section 1328 of the Unemployment Insurance Code states:

> "The department shall consider the facts submitted by an employer pursuant to Section 1327 and, if benefits are claimed subsequent to the filing of the new or additional claim, make a determination as to the claimant's eligibility for benefits. The department shall promptly notify the claimant and any employer who prior to the determination has submitted any facts or given any notice pursuant to Section 1327 or this section and authorized regulations of the determination or reconsidered determination and the reasons therefor. . . . The claimant and any such employer may appeal from a determination or reconsidered determination to an administrative law judge within 20 days from mailing or personal service of notice of the determination or reconsidered determination. The 20-day period may be extended for good cause, which shall include, but not be limited to, mistake, inadvertence, surprise, or excusable neglect. The director shall be an interested party to any appeal."

Section 1030 of the Unemployment Insurance Code states:

"(a) Any employer who is entitled under Section 1327 to receive notice of the filing of a new or additional claim may, within 10 days after mailing of the notice, submit to the department any facts within its possession disclosing whether the claimant left the employer's employ voluntarily and without good cause or was discharged from the employment for misconduct connected with his or her work . . . . The period during which the employer may submit these facts may be extended by the director for good cause.

"(b) Any base period employer who is not entitled under Section 1327 to receive notice of the filing of a new or additional claim and is entitled under Section 1329 to receive notice of computation may, within 15 days after mailing of the notice of computation, submit to the department any facts within its possession disclosing whether the claimant left the employer's employ voluntarily and without good cause or was discharged from the employment for misconduct connected with his or her work . . . . The period during which the employer may submit these facts may be extended by the director for good cause.

"(c) The department shall consider these facts together with any information in its possession. If the employer is entitled to a ruling under subdivision (b) or to a determination under Section 1328, the department shall promptly notify the employer of its ruling as to the cause of the termination of the claimant's employment. The employer may appeal from a ruling or reconsidered ruling to an administrative law judge within 20 days after mailing or personal service of notice of the ruling or reconsidered ruling. The 20-day period may be extended for good cause, which shall include, but not be limited to, mistake, inadvertence, surprise, or excusable neglect."

Section 1032 of the Unemployment Insurance Code states:

"If it is ruled under Section 1030 or 1328 that the claimant left the employer's employ voluntarily and without good cause or was discharged by reason of misconduct connected with his or her work, . . . benefits paid to the claimant subsequent to the termination of employment due to the voluntary leaving or discharge, . . . shall not be charged to the account of the employer, . . . unless he or she failed to

furnish the information specified in Section 1030 within the time limit prescribed in that section or unless such ruling is reversed by a reconsidered ruling."

Section 1329 of the Unemployment Insurance Code states:

"Upon the filing of a new claim for benefits, the department shall promptly make a computation on the claim which shall set forth the maximum amount of benefits potentially payable during the benefit year, and the weekly benefit amount. The department shall promptly notify the claimant of the computation. The department shall promptly notify each of the claimant's base period employers of the computation after the payment of the first weekly benefit."

Section 1331 of the Unemployment Insurance Code states:

"Any base period employer shall, within 15 days after mailing of a notice of computation, submit to the department any facts then known which he or she was not previously required to submit to the department under Section 1327 which may affect the claimant's eligibility for benefits. The 15-day period may be extended for good cause."

Section 1334 of the Unemployment Insurance Code states:

"An administrative law judge after affording a reasonable opportunity for fair hearing, shall, unless such appeal is withdrawn, affirm, reverse, modify, or set aside any determination which is appealed under this article. The claimant, any employer becoming a party to the appeal by submitting a protest or information pursuant to Sections 1326 to 1333, inclusive, of this article, and the director shall be promptly notified in writing of the administrative law judge's decision, together with his reasons therefor. The decision shall be final unless, within 20 days after mailing of such decision, further appeal is initiated to the appeals board pursuant to Section 1336. The 20-day limitation may be extended for good cause."

Section 1336 of the Unemployment Insurance Code states:

> "The director or any party to a decision by an administrative law judge may appeal to the appeals board from the decision. The appeals board may order the taking of additional evidence and may affirm, reverse, modify, or set aside the decision of the administrative law judge. The appeals board shall promptly notify the director and the parties to any appeal of its order or decision."

Section 5045(e), Title 22, California Code of Regulations, provides in part that a party to an appeal, within 20 days after mailing or personal service, may apply to vacate the administrative law judge's decision where the party failed to appear at a hearing and the administrative law judge's decision on the merits is adverse to the party's interests. Upon a showing of good cause for failure to appear at a hearing, an administrative law judge shall issue an order vacating the decision and the matter shall be set for further hearing.

Section 5005, Title 22, California Code of Regulations, provides in part that the time for filing an application may be extended or a late filing permitted upon a showing of good cause for the delay.

In Precedent Decision P-B-421 a reserve account employer timely responded to a notice of claim filed sent to the employer by the EDD pursuant to section 1327 of the code. EDD issued a determination only to the claimant, disqualifying him for benefits under section 1256 of the code. Although the employer was entitled to a determination and ruling under sections 1328 and 1032 of the code, through EDD error it was furnished neither. The claimant appealed the determination to an administrative law judge and a hearing was held which the employer did not attend because the employer had not been made a party and did not receive notice of the hearing. The administrative law judge issued a decision reversing the determination of the EDD and holding the claimant was not disqualified from receiving benefits under code section 1256. Subsequently, the employer's agent inquired of EDD as to what action, if any, had been taken with respect to the claim. Beyond the normal 20 days allowed to appeal or request vacation of the administrative law judge's decision, EDD notified the Office of Appeals by telephone of its error. Upon the advice of an administrative law judge, EDD issued to the employer a determination and ruling disqualifying

the claimant under section 1256 of the Code and relieving the employer's account under section 1032. An administrative law judge then issued an order setting aside the previously issued decision and scheduling a new hearing on the ground that the employer, as an interested party, had not been given notice of the first hearing. The employer attended the second hearing which resulted in a decision unfavorable to the claimant who appealed to the Appeals Board.

Precedent Decision P-B-421 held that the administrative law judge was without authority to issue an order setting aside the earlier decision in those circumstances. The Appeals Board noted that, although it possesses specific power under sections 412 and 413 of the Unemployment Insurance Code to assume jurisdiction over a case if it acts in a timely manner, there is no statutory authority permitting an administrative law judge to set aside or otherwise alter the decision of another administrative law judge that had become final. The Board stated, "[O]nce a decision has been issued by an administrative law judge, the only avenue of redress specifically available by law to an aggrieved party is the appeal procedure granted by sections 1334 and 1336 of the Unemployment Insurance Code, and the reopening process allowed by Title 22, section 5045, California Administrative Code [now California Code of Regulations]."

Since the employer had not timely appealed the first decision of an administrative law judge and had not timely submitted a written petition to reopen the matter, the Appeals Board set aside the second decision on the merits, declared the order of the administrative law judge purporting to set aside the first decision to be a nullity and found the first decision holding the claimant not disqualified under section 1256 of the code to be final. The Board stated:

> "Where the administrative law judge has issued a decision favorable to the claimant under section 1256, and the time to petition for reopening or to appeal to this Board has expired, the section 1256 issue must be considered as finally adjudicated. The Department should promptly issue a ruling to the employer, based on all available evidence, regardless of whether such ruling accords with, or is contrary to, the administrative law judge's decision under section 1256."

We believe the above is in error in two regards. First, in proclaiming the decision of the administrative law judge to be final, the provisions of section 1328 of the Unemployment Insurance Code and section 5005, Title 22, California Code of Regulations, which allow the normal 20 day period in which to appeal or apply to vacate the decision of an administrative law judge to be extended for good cause, were ignored. Second, bifurcation of the issues under sections 1256 and 1032 is encouraged, thus increasing the possibility of inconsistent results. Although such bifurcation may be unavoidable on occasion, we no longer think inconsistent results should be encouraged.

In reviewing the situation in P-B-421, we note that the employer in that case timely responded to the notice of claim sent by EDD pursuant to section 1327 of the code. Therefore, under sections 1328 and 1334, the employer became a party to the claimant's appeal by operation of law. However, through EDD error the employer was not afforded its rights as a party prior to the decision of an administrative law judge which reversed a previously issued EDD determination and held the claimant was not disqualified for benefits under code section 1256. We now believe the EDD should have taken the following actions in these circumstances.

First, the EDD should have furnished the employer the determination to which it was entitled. By the time EDD acted, the decision of the administrative law judge reversing the original determination of the EDD and holding the claimant not disqualified for benefits under code section 1256, constituted the determination then in effect. This is the determination that should have been furnished to the employer.

Second, section 1031 of the Code states, "No ruling made under Section 1030 may constitute a basis for the disqualification of any claimant but a determination by the department made under the provisions of Section 1328 may constitute a ruling under Section 1030." Therefore, we believe the EDD should have issued to the employer a ruling consistent with the administrative law judge's decision (determination) and holding the employer's reserve account subject to benefit charges.

Finally, there is obviously good cause to extend the period in which the employer has to appeal or apply to vacate the

administrative law judge's decision (determination) until the employer is aware of the decision. Therefore, we believe the EDD should have informed the employer it had 20 days from the mailing of the ALJ's decision to the employer by the EDD in which to appeal and/or request vacation of the decision, as well as to appeal the ruling. This does not mean that the employer has to take any action or that it necessarily will do so. If the employer is persuaded that the decision (determination) of the administrative law judge and the ruling are correct, the employer may simply refrain from taking any action and the matter will become final.

We overrule P-B-421 insofar as it is inconsistent with the procedure set forth above. We also overrule that portion of P-B-421 which states that when an employer attends a hearing at which the claimant is not present for lack of proper notice and receives a favorable decision from an administrative law judge, the issue under section 1032 should be deemed final if the appeal or reopening time has run before the claimant learns about the hearing. We hold that if the claimant appeals or requests to vacate the adverse decision of an administrative law judge within such time as the period to do so may be extended for good cause, both the sections 1256 and 1032 issues should be decided concurrently and consistently. (See Appeals Board Precedent Decision P-B-424).

In the cases before us the employer timely responded to the first notice of claim filed that was sent to him by the EDD and became a party to the appeal proceedings by operation of law. Through no fault of his own the employer was not afforded the rights of a party until after an administrative law judge had issued a decision holding the claimant was not disqualified for benefits under section 1256 of the code. Good cause has been shown for the employer's delay in appealing the decision of the administrative law judge and requesting reopening of the matter. We will therefore grant the employer's request to reopen and remand the issue of the claimant's entitlement to benefits under section 1256 of the code for an additional hearing and decision.

Although normally the sections 1256 and 1032 issues should be decided concurrently and consistently, EDD bifurcated the issues in these cases. Since the ruling to the employer was issued subsequent to the decision of the administrative law judge and was authorized by the law then in effect under P-B-421, and because the ruling has not been appealed by any party, we hold that the ruling is final and has been irrevocably bifurcated from

the issue of the claimant's entitlement to benefits under code section 1256.

DECISION

The order of the administrative law judge in Case No. 94-18800 is reversed and reopening is granted. The appealed portion of the decision of the administrative law judge in Case No. 94-18801 is set aside and this matter is remanded to an administrative law judge for an additional hearing and decision on the issue of the claimant's entitlement to benefits under section 1256 of the code. The favorable ruling issued to the employer relieving the employer's reserve account of benefit charges is final and shall stand as issued. The transcript, exhibits and other documents previously produced in the course of these proceedings shall remain part of the record.

Sacramento, California, January 3, 1996.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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